

OCT 25 2006

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NC-06-1150-SPaBu  
 )  
RODOLFO VELASQUEZ, ) Bk. No. 05-35378  
 )  
Debtor. )

RODOLFO VELASQUEZ, )  
 )  
Appellant, )

v. )

MEMORANDUM<sup>1</sup>

DAVID BURCHARD, Chapter 13 )  
Trustee; JOSE TELLECHEA, )  
Administrator of the Estate )  
of Juan Jose Tellechea, )  
 )  
Appellees. )

Argued and Submitted on October 18, 2006  
at San Francisco, California

Filed - October 25, 2006

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Dennis Montali, Bankruptcy Judge, Presiding.

Before: SMITH, PAPPAS and BUFFORD,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or rules of res judicata, including claim preclusion and issue preclusion. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Samuel L. Bufford, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Following the entry of a judgment against debtor in state  
2 court, appellee proceeded to place a judgment lien on debtor's  
3 non-exempt real property. However, before appellee could levy  
4 upon the property, debtor filed for chapter 13<sup>3</sup> relief. Appellee  
5 moved for dismissal of the bankruptcy case under § 1307(c) on the  
6 basis of bad faith. The bankruptcy court granted the motion. A  
7 timely notice of appeal was filed on April 12, 2006. We AFFIRM.

## 8 I. FACTS

### 9 A. The State Court Judgment

10 On December 2, 1999, debtor Rodolfo Velasquez ("Debtor") and  
11 Alberto Carrillo ("Carrillo") filed a complaint in the Alameda  
12 County Superior Court ("state court") against Juan Jose Tellechea  
13 ("decedent") seeking reimbursement for \$14,150.36 in property  
14 taxes they had paid for related to decedent's residence.<sup>4</sup> The  
15 complaint was amended several times and ultimately sought only to  
16 quiet title of the residence in Debtor and Carrillo based upon  
17 adverse possession.

18 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
20 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
21 enacted and promulgated pursuant to The Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,  
Apr. 20, 2005, 119 Stat. 23.

22 <sup>4</sup> In September 1996, decedent passed away and left his  
23 estate to his siblings. Maria Tellechea was appointed as the  
24 executor, but opted out and nominated a California resident to  
25 act for her. In late 2000, she learned of the nominee's  
26 mismanagement of the estate. This led to Jose Tellechea's  
("Appellee") appointment as the special administrator of the  
estate in February 2001.

27 Prior to Appellee's appointment, Carrillo moved into  
28 decedent's residence at 1550 Pacific Avenue, San Leandro,  
California, and began to occupy it illegally. Carrillo and  
Debtor learned that property taxes were owed on the property,  
which they paid.

1 In early 2001, while the quiet title action was pending,  
2 Appellee filed an unlawful detainer action against Debtor and  
3 Carrillo. Thereafter, the two cases were consolidated. The  
4 quiet title action was dismissed pursuant to Appellee's  
5 demurrer<sup>5</sup>, and an unlawful detainer judgment for possession was  
6 entered against Carrillo and Debtor.

7 In addition to the quiet title action, Carrillo and Debtor  
8 had filed various lawsuits and motions against Appellee including  
9 (1) a creditor's claim for \$220,000 for the value of the  
10 decedent's residence; (2) a will contest; (3) a petition for  
11 suspension of powers and removal of administrator; and (4) a  
12 motion for reconsideration, consolidation, and leave to file a  
13 cross complaint. The state court either denied or dismissed all  
14 of these lawsuits and motions for lack merit.

15 On March 12, 2002, the state court addressed Appellee's  
16 request for attorneys' fees and costs incurred in defending  
17 against the quiet title action and the various other motions and  
18 pleadings filed by Debtor and Carrillo. Several years earlier,  
19 Debtor had been designated a vexatious litigant by another  
20 court.<sup>6</sup> Because he did not notify the state court of the  
21 designation or obtain the requisite pre-filing orders before

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22 <sup>5</sup> The Court of Appeal affirmed the state court's decision in  
23 the quiet title action. This opinion can be found at Velasquez  
24 v. Tellechea, 2003 WL 1875462 \*1 (Cal. App. 1st Dist. 2003)  
(unpublished opinion).

25 <sup>6</sup> In 1996, an order was entered in Solano County Superior  
26 Court which declared Debtor to be a vexatious litigant and  
27 required him to obtain a pre-filing order prior to filing any  
28 pleadings in a California state court. Debtor successfully moved  
to set aside the vexatious-litigant order on January 27, 2002;  
however, the Solano County Court subsequently retracted that  
decision on September 30, 2002.

1 filing any of the lawsuits and motions against Appellee, the  
2 state court imposed sanctions against him in the amount of  
3 \$31,895.<sup>7</sup> The state court also found Debtor to be a vexatious  
4 litigant within the meaning of California Code of Civil Procedure  
5 ("C.C.P.") § 391(b)(3).

6 On August 18, 2004, in an effort to set aside the sanctions  
7 order and the order dismissing his quiet title action, Debtor  
8 filed a complaint in district court requesting that it 1) declare  
9 the state court's sanction order a violation of his civil rights,  
10 2) reduce the sanction amount to \$1,000, and 3) remove Appellee's  
11 judgment lien against his property. The district court dismissed  
12 the complaint.

13 Following the dismissal of the federal action, Appellee  
14 levied on Debtor's non-exempt real property located at 426 Idora  
15 Avenue, Vallejo, California, and obtained an assignment order for  
16 rents under C.C.P. § 708.510.

17 B. The Bankruptcy

18 In November 2005, less than a month after Appellee began to  
19 levy on his property, Debtor filed a chapter 13 petition.  
20 Thereafter, he filed his proposed chapter 13 plan, which provided  
21 for payments of \$50 per month to Appellee for three years.

22 Believing Debtor had filed for bankruptcy in bad faith,  
23 Appellee filed a motion to dismiss the case pursuant to § 1307(c)  
24 (the "dismissal motion") and objected to confirmation of the plan  
25  
26

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27 <sup>7</sup> Carrillo had not been declared a vexatious litigant when  
28 the various lawsuits and motions were filed. Thus, the state  
court only entered sanctions against Debtor.

1 under § 1324.<sup>8</sup> Appellee complained that Debtor had filed for the  
2 sole purpose of interfering with Appellee's collection efforts.  
3 Further, according to Debtor's schedules and statement of  
4 affairs, he had approximately \$500,000 in non-exempt assets  
5 (consisting primarily of equity held in two pieces of real  
6 property) that could be used to pay Appellee's judgment.  
7 Finally, Debtor had not identified any other claim on his  
8 petition that would justify the need for bankruptcy relief.  
9 Based on Debtor's solvency, ability to pay his creditors by  
10 simply refinancing one of his properties, and his improper  
11 purpose for filing, Appellee urged the court to dismiss the case.

12 Debtor responded that it was Appellee who was acting in bad  
13 faith by trying to collect on a judgment Debtor believed violated  
14 his constitutional rights and by failing to inform the court that  
15 Appellee owed Debtor nearly \$20,000 for reimbursement of property  
16 taxes. Debtor also urged the bankruptcy court to defer any  
17 ruling on Appellee's request until the Ninth Circuit Court of  
18 Appeals renders its decision in Wolfe v. George, No. 05-16674  
19 (9th Cir. filed Sept. 1, 2005), a case concerning the  
20 constitutionality of the sanctions provision of the California  
21 vexatious litigant statute. According to Debtor, a favorable  
22 decision in Wolfe would render Appellee's judgment against him  
23 unconstitutional. Therefore, Debtor suggested that the  
24 bankruptcy court direct Appellee to accept the monthly \$50 plan

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25 <sup>8</sup> In the motion, Appellee objected to the confirmation of  
26 the proposed chapter 13 plan on the basis that 1) Debtor's  
27 petition did not evidence any disposable income that could be  
28 used to make the monthly payments provided for under the plan;  
and 2) Debtor had not proposed the plan in good faith in light of  
the equity he held in his real property which he could use to pay  
Appellee's secured claim in full.

1 payments until the Ninth Circuit rules in Wolfe<sup>9</sup> or, in the  
2 alternative, until he runs out of further avenues to attack the  
3 validity of Appellee's judgment. He also maintained that the  
4 bankruptcy filing had been filed in good faith for the proper  
5 purpose of providing him with immediate relief from the pressure  
6 occasioned by Appellee's attempt to levy on what Debtor  
7 considered a non-final judgment.

8 The dismissal motion was heard on March 15, 2006. In its  
9 oral ruling, the bankruptcy court agreed with Appellee that  
10 Debtor had filed his petition in bad faith and had abused the  
11 bankruptcy system by 1) filing for the improper purpose of  
12 frustrating Appellee's collection efforts; and 2) failing to  
13 disclose assets on his schedules and to the chapter 13 trustee.  
14 The court recognized that Appellee held a final state court  
15 judgment against Debtor, and that Debtor could not use the  
16 bankruptcy process to thwart Appellee's relatively modest  
17 judgment when he had assets worth hundreds of thousands of  
18 dollars to pay it. Taking into account Debtor's financial  
19 situation, the amount Appellee was owed, and the minimal affect  
20 payment of Appellee's judgment would have on other creditors, the  
21 court found dismissal to be warranted.

22 Debtor appeals.

## 23 II. JURISDICTION

24 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
25 and §§ 157(b)(1), (b)(2)(A), and (2)(B). We have jurisdiction  
26 under 28 U.S.C. §§ 158(b)(1) and (c)(1).  
27

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28 <sup>9</sup> As of this date, the Ninth Circuit has not issued a  
decision in Wolfe.

1 III. ISSUE<sup>10</sup>

2 Whether the bankruptcy court abused its discretion in  
3 dismissing the bankruptcy based on a finding of bad faith.

4 IV. STANDARD OF REVIEW

5 We review for clear error a bankruptcy court's finding of  
6 bad faith. Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th  
7 Cir. 1993). "However, dismissal of a bankruptcy case for lack of  
8 good faith is a matter in the sound discretion of the bankruptcy  
9 court and is reviewed for an abuse of discretion." Greatwood v.  
10 I.R.S. (In re Greatwood), 194 B.R. 637, 639 (9th Cir. BAP 1996).

11 V. DISCUSSION

12 Debtor complains that the bankruptcy court abused its  
13 discretion in dismissing his bankruptcy because he was 1) willing  
14 to amend his schedules to include the undisclosed assets; and 2)  
15 entitled to a judicial determination as to the dischargeability  
16 of Appellee's debt pursuant to § 523(a)(6) and as to Appellee's  
17 liability to Debtor.

18 Section 1307(c) authorizes the bankruptcy court to dismiss a  
19 case for cause. Although not specifically listed as one of the  
20 enumerated circumstances, bad faith may constitute "cause" for  
21 dismissal. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224  
22 (9th Cir. 1999). In determining whether a chapter 13 debtor

23 <sup>10</sup> Debtor requests that the panel decide issues which go  
24 beyond the scope of this appeal, i.e., his right to a jury trial  
25 to determine the liability of Debtor and Appellee and the  
26 validity of Appellee's state court judgment. Because our  
27 jurisdiction is limited to issues concerning the dismissal order,  
28 we decline to consider any issue not related thereto. See Kalt  
v. Hunter (In re Hunter), 66 F.3d 1002, 1005 (9th Cir.  
1995) ("Federal courts are courts of limited jurisdiction. They  
possess only that power authorized by Constitution and statute,  
which is not to be expanded by judicial decree."); Birting  
Fisheries, Inc. v. Huse-Sporsem (In re Birting Fisheries, Inc.),  
300 B.R. 489, 504 n.15 (9th Cir. BAP 2003).

1 filed his or her petition in bad faith, a court must apply a  
2 totality of the circumstances test, taking into account the  
3 following factors:

4 (1) whether the debtor "misrepresented facts in his  
5 [petition or] plan, unfairly manipulated the Bankruptcy  
6 Code, or otherwise [filed] his Chapter 13 [petition or]  
7 plan in an inequitable manner,"

8 (2) "the debtor's history of filings and dismissals,"

9 (3) whether "the debtor only intended to defeat state  
10 court litigation," and

11 (4) whether egregious behavior is present.

12 Id. at 1224 (citations omitted). Fraudulent intent by the debtor  
13 is not required for a finding of bad faith. Id.

14 We are not persuaded that the bankruptcy court committed a  
15 clear error of judgment in finding that Debtor had filed his  
16 petition in bad faith. In making the bad faith determination,  
17 the court specifically articulated three different bases for its  
18 findings: 1) by his own admission, Debtor filed the petition for  
19 the purpose of preventing Appellee from enforcing the state court  
20 judgment; 2) Debtor failed properly to disclose all of his assets  
21 in his schedules; and 3) Debtor failed to disclose all of his  
22 assets, including details concerning substantial assets he owned  
23 in Mexico, to the chapter 13 trustee. In addition, the court  
24 found that Debtor had a net worth of hundreds of thousands of  
25 dollars that could be used to satisfy Appellee's judgment.

26 The findings of the bankruptcy court are amply supported by  
27 the record. First, Debtor admitted in his opposition to the  
28 dismissal motion that he filed the bankruptcy case in order to  
stall Appellee's collection efforts. Second, a review of  
Debtor's schedules confirm that he failed to list any of his real



1 property in Mexico and that he listed several assets as  
2 "Irrelevant to Creditors." Third, there is no dispute that  
3 Debtor's equity in real property exceeded \$600,000 at the time of  
4 the filing.

5 Notably, even if Debtor had been allowed to amend his  
6 schedules to include the missing information, his purpose for  
7 filing for chapter 13 relief still "violate[s] the spirit of the  
8 chapter." Chinichian v. Campolongo (In re Chinichian), 784 F.2d  
9 1440, 1445 (9th Cir. 1986). Debtor in this case does not  
10 represent "the poor, the oppressed and the unfortunate seeking a  
11 fresh start." Id. He admits to be "sitting down in a sea of  
12 money" and that a liquidation of one of his properties would  
13 cover payment of Appellee's judgment. In addition, there is no  
14 indication that he is having difficulty in meeting any of his  
15 financial obligations. Instead, Debtor's sole purpose in filing  
16 his chapter 13 case was to defeat Appellee's execution of the  
17 judgment.

18 While we recognize the apparent sincerity of Debtor's belief  
19 that the sanctions judgment is unconstitutional, as well as his  
20 frustration in not being able to collect the amount he claims to  
21 be owed by Appellee for reimbursement of property taxes, the  
22 circumstances of this case nevertheless fully support the factual  
23 findings of the bankruptcy court. Consequently, the bankruptcy  
24 court did not abuse its discretion in dismissing Debtor's  
25 bankruptcy for cause based on bad faith.

## 26 VI. CONCLUSION

27 For the foregoing reasons, we AFFIRM the order entered by  
28 the bankruptcy court dismissing Debtor's bankruptcy case.

U.S. Bankruptcy Appellate Panel  
of the Ninth Circuit  
125 South Grand Avenue, Pasadena, California 91105  
Appeals from Central California (626) 229-7220  
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. NC-06-1150-SPaBu

RE: RODOLFO VELASQUEZ

A separate Judgment was entered in this case on 10/25/06.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.  
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the \$455 filing fee (effective November 1, 2003) and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

CERTIFICATE OF MAILING

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The undersigned, deputy clerk of the U.S. Bankruptcy  
Appellate Panel of the Ninth Circuit, hereby certifies that a copy  
of the document on which this certificate appears was mailed this date  
to all parties of record to this appeal.

By: Edwina Clay

Deputy Clerk: October 25, 2006